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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 64, Original

The State of New Hampshire,
Plaintiff
v.
The State of Maine,
Defendant

REPLY BRIEF OF THE PLAINTIFF

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REPLY BRIEF OF THE PLAINTIFF

Introduction

In this brief in reply to the defendant's exceptions to the report of the Special Master, New Hampshire will present its argument as to why these exceptions are not meritorious and therefore should be overruled.

The defendant, State of Maine, took only two exceptions to the findings and rulings of the Special Master, viz.:

(1) To his ruling that "geographic middle" of the Piscataqua, rather than the "thalweg" should be used to determine the terminus of the boundary at Portsmouth Harbor, historically called Piscataqua Harbor.

(2) To his ruling recommending the rejection of the motion for entry of judgment by consent of plaintiff and defendant.

Summary of Argument

The "geographic middle" of the Piscataqua, rather than the "thalweg", was more probably in accord with the intention of the King in Council in its order or decree of April 9, 1740, fixing the boundary between the Province of New Hampshire and the District of Maine. The parties' pleadings, arguments, and appeals, and the decision of the provincial Boundary Commissioners in the period 1737-1740 show that all the participants in this boundary dispute were probably thinking in terms of "geographic middle" rather than "thalweg". The use of "geographic middle" as the boundary line at the mouth of the harbor results in a more equitable division of fishing territory. No problem as to equality of navigation rights exists in the disputed water area.

The motion for entry of a consent decree should have been rejected, because the proposed decree was determined to be contrary to the law on the record before the Special Master. The Special Master was required to review the proposed consent decree and weigh it against the law and the evidence on the record before him (see stipulation for record as reported by Special Master, Report pp. 2-3), for this review was an essential part of the "judicial process" and fundamental to this Court's jurisdiction. New Hampshire represents that it is prepared, *if necessary*, to file a motion for leave to withdraw from the pending motion for entry of a consent decree, if this Court rules that the Special Master was correct in adopting, as the boundary, the "geographic middle" of the Piscataqua rather than the "thalweg", and in locating the closing line of the mouth of Portsmouth Harbor where he did.

Preliminary Statement

Neither the plaintiff nor the defendant have excepted to the following ruling and finding of the Special Master (Report, p. 4)

> "In the event the Court decides that the proposed consent decree cannot be entered, the dispute submitted to the Court and referred by it to the Special Master can be resolved on the stipulated record now before the Special Master, without further evidentiary hearings."

At pages 7 and 10 of the defendant's brief in support of its exceptions, the statement is made that New Hampshire cooperated with Maine in "extensive surveys of the bottom of the river" which determined where the river bottom merged with the ocean bottom. This statement is an error, no doubt inadvertently caused by changes in personnel in the Office of the Attorney General of Maine. If any such bottom surveys were ever undertaken, New Hampshire never took part in them and never was informed of the results thereof. It is erroneous to assert that New Hampshire is in agreement therewith.

The findings of fact of the Special Master are entitled to a presumption of correctness. While this Court is not strictly bound by the Federal Rules of Civil Procedure, Rule 53(e)(2) is declaratory of general law and practice when it states that "the court shall accept the master's findings unless clearly erroneous". And in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 at 689, this Court held that it was error to reject the findings of fact of a master if they are "supported by substantial evidence and are not clearly erroneous". See also *Patrol Valve Co.* v. *Robertshaw-Fulton Controls Co.*, 210 Fed(2) 146, and *In Re Lurie*, 267 Fed.(2) 33.

I. THE SPECIAL MASTER WAS CORRECT IN REJECTING THE "THALWEG" AS THE RIVER BOUNDARY AND APPLYING THE RULE OF "GEOGRAPHIC MIDDLE"

A. *"Thalweg" is a newer and more modern rule of interpretation, not in use in 1740.*

Whenever the phrase "middle of the river" has to be interpreted as here, there are two possible interpretations, i.e., the thalweg (or middle of the channel of navigation) and the geographic middle of the river. We are here asking the Court to interpret the words "middle of the river" as used in an Order in Council dated April 9, 1740. We must put ourselves in the position of those adopting this Order in Council in 1740 and determine what the law was *at that time*. See *The Grisbadarna Case*, Scott, Hague Court Reports (1916) 121 at 127: "We must have recourse to the principles of law in force at that time (1658)".

Prior to the early 19th century, the law designated the boun-

dary in a river to be the geographic middle or median line. 3 Verzijl, International Law in Historical Perspective (1970), 553 et seq. The thalweg principle was first proposed in 1797 in the Congress of Ratstadt, and was first employed in the Treaty of Luneville, 1801. 3 Verzijl, *supra*, 554; Cukwurah, The Settlement of Boundary Disputes in International Law (1967). 52; *New Jersey* v. *Delaware*, 291 U.S. 361, 381-383 (1934). The thalweg theory spread to other European waterways in the first decades of the nineteenth century, but its development in North America was slower. 3 Verzijl, *supra*, 534-535. It "was not authoritative doctrine prior to 1892 . . .,and certainly not . . .in 1812." *Texas* v. *Louisiana*, 410 U.S. 702, 709 (1973). Clearly, the thalweg rule did not exist in 1740 and the "middle of the river" was considered to be the geographic median line.

The long list of precedents cited in Verzijl, *op. cit.*, is most persuasive of his viewpoint as to the relatively modern origin of the thalweg doctrine.

The "thalweg" rule of interpretation rests on a line of cases beginning with *Iowa* v. *Illinois*, 147 U.S. 1 (1892). It is a rule of interpretation recognized with reference to federal statutes defining boundaries of newly admitted states. However, this Court has always said that the key question is the "intent of Congress" or other legislative body enacting a boundary instrument.

The case of *New Jersey* v. *Delaware*, *supra*, is in a sense, distinguishable, because there the Court was not interpreting a boundary instrument; it was fixing a boundary where none had authoritatively existed before. Thalweg was selected as more equitable under the circumstances of that case.

But in 1740 the "geographic middle" or median line was the governing tool of interpretation under international law, and the Special Master was correct in applying it here.

B. *The intention of those participating in the proceedings leading to the Order in Council of April 9, 1740 was to use "geographic middle" as the Piscataqua boundary.*

The parties to the boundary dispute and their representatives, in their arguments and pleadings, and the provincial Boundary Commissioners in their decision, preliminary to the final decision of the King in Council in 1740, showed that they considered there to be a difference in meaning between the

words "middle of the river" and the words "middle of the channel of the river", and used these words with some precision and as if they had different meanings.

In New Hampshire's demand filed with the Boundary Commissioners, August 1, 1737, its committee laid claim to a southern boundary beginning "at the end of three miles north from the middle of the channel of the Merrimack River where it runs into the Atlantic Ocean". In contrast the New Hampshire claim to the northern boundary was to "begin at the entrance of Piscataqua Harbor & so to pass up the same into the River of Newichwannock & through the same into the furthest head thereof," with no further amplification as to the division of the River, if any. *N.H. State Papers*, Vol. XIX, pp. 283, 284; see Appendix I.

Massachusetts' original demand submitted to the same Boundary Commissioners, August 5, 1737 did not use this language at this time and claimed "Black Rocks" on the northern side of the Merrimack River as a point of reference. *N.H. State Papers*, vol. XIX, pp. 290; see Appendix II. In Massachusetts' subsequent answer to New Hampshire's claim, its agents reiterated that the southern boundary of New Hampshire should be measured from "Black Rocks" and rejected the use of the "Middle of the channel of the Merrimack River" as a base point. *N.H. State Papers*, vol. XIX, 299 at 309; see Appendix III. New Hampshire's use of the "middle of the channel" as the base point rather than "Black Rocks" appears to have been motivated by the fact that the main channel of the Merrimack River had, over a period of time, moved southerly from "Black Rocks", almost a mile, and thus its use as a point of reference would give New Hampshire a belt of additional territory, one mile in width. See *N.H. State Papers*, XIX, at 592; see Appendix V. It appears that, at its mouth, the Merrimack River was then a little over one mile in width; thus the reference to the "channel" (i.e., deepest part of the River*) rather than to the "middle" of the River is significant. See Mitchell's Plan, Appendix C to Report of Special Master herein.

* Webster's International Dictionary (2d ed.) defines "channel" as "the deepest part of a river, harbor, strait, etc., where the main current flows or which affords the best passage".

The decision of the Boundary Commissioners September 2, 1737, accepted Massachusetts' claim as to the point of beginning of the southern boundary of New Hampshire, which was set at a point "three English miles north from the Mouth of said River beginning at the southerly side of Black Rocks so called at low water mark." As to the northern boundary of New Hampshire, the decision provided "that the Dividing Line Shall pass up thro' the Mouth of Piscataqua Harbor & up the middle of the River, etc. etc." N.H. *State Papers,* vol. XIX, 391, 392; see Appendix IV. This was the first time the phrase "middle of the river" was used, during this controversy, with respect to the northern boundary.

Both New Hampshire and Massachusetts appealed to the Privy Council from the decision of the Boundary Commissioners. In New Hampshire's appeal, one of the grounds was again a protest of the use of "Black Rocks" as a point of reference for calculating the position of the southern boundary, rather than the "middle of the channel of the (Merrimack) River". As to the northern boundary, New Hampshire appealed from the ruling that the boundary went up "the middle of the Piscataqua River", on the ground that the whole river belonged to New Hampshire and urged that this part of the decision, "which in consequence adjudges *half of the river* to Massachusetts without any demand by, or any Title in, Massachusetts, will be reversed". *N.H. State Papers,* XIX, 565 at 591 and 596-597 (Appendix V) As noted by the Special Master, the New Hampshire agents interpreted "middle of the River" to mean its geographical middle by their conclusion that the decision had awarded "half the River" to Massachusetts (Report at pp. 40-41).

In Massachusetts' appeal (which related to the course of the southerly boundary), an effort was made to answer New Hampshire's appeal. Massachusetts again urged rejection of the "the middle of the channel of the Merrimack River" as a base point for the southern boundary. As for the northern boundary, Massachusetts claimed that the Commissioners were correct in fixing the boundary at "the middle of the Piscataqua River", asserting that there were numerous islands in the River and that in past history the two provinces had in

practice accepted the middle of the river as the boundary "the Fact being, That all the Islands in the said River have been always considered and taxed as belonging to the Government they lay nearest to". By this language it seems clear that Massachusetts interpreted "middle of the river", as used in the decision, to mean the geographic middle as had New Hampshire. *N.H. State Papers,* vol. XIX, 601 at 622, 627; Appendix VI.

On appeal, the decision of the Boundary Commissioners was modified by the Privy Council as to the southern boundary but affirmed as to the northern boundary. (Report at pp. 30-31; Appendix VII.)

The decision as to the northern boundary within the Piscataqua River acquires greater significance when it is remembered that the deepest part of the Piscataqua River and Harbor, proceeding southeasterly from Fort Point to the mouth of the Harbor (i.e., the mouth as located by the Special Master) lies substantially closer to the New Hampshire shore than to the Maine shore, and has been so marked by modern range lights and a range line for the navigation of ships. See U.S. Coast and Geodetic Survey Chart No. 211 filed as Appendix A to Special Master's Report. Thus if the more modern "thalweg" doctrine should be chosen as the basis of the state boundary (despite the Special Master's rejection of the same), the state boundary line would cross the closing line of the harbor substantially closer to the New Hampshire shore than to the Maine shore, with the additional effect of deflecting the entire state boundary between Portsmouth and the Isles of Shoals in a southwesterly direction, to the prejudice of New Hampshire.

The present case, therefore, presents an even stronger background for an interpretation of "geographic middle" than existed in *Texas* v. *Louisiana,* 410 U.S. 702 (1973), where this Court also rejected thalweg in favor of geographic middle, as the river boundary, based on its construction of the intent of Congress. The intention of the King in Council here was more probably the same.

C. *Where there is freedom of navigation, the case for use of the thalweg rule is much weaker.*

In *Texas* v. *Louisiana, supra,* this Court pointed out that "within the United States, two states bordering on a navigable

river would have equal access to it for purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg" 410 U.S. at 709-710.

In the colonial period of New Hampshire history, water traffic on the Piscataqua appears to have been free alike to the inhabitants of New Hampshire and southern Maine. A close examination of Vols. I-III (inclusive) Laws of New Hampshire (1670-1774) reveals no colonial statutes restricting free passage of vessels in the river and harbor. The trade instructions of the British government to Governor Benning Wentworth (1741) Vol. II, Laws of N.H., 638 at 646 (par. 19) indicate that all ships of British registry, i.e., owned by British subjects or inhabitants of any of her Colonies, were "qualified to trade to, from or in any of our Plantations in America". In "Ports of Piscataqua" by William G. Saltonstall (Harvard Univ. Press, 1941), it is made clear that shipbuilding, fishing and seagoing commerce were extensively carried on out of the Maine towns of Kittery, Eliot and Berwick on the northerly shore of the Piscataqua, as well as out of Portsmouth, New Hampshire on the southerly shore, both prior to and after 1740, a condition which would not have been likely to exist unless there was freedom of passage on the Piscataqua to inhabitants of both provinces. See Saltonstall, *op. cit.* at pp. 12, 18, 21, 23, 31-33, 29, 39, 44, 54.

The thalweg rule is more adapted to use where the river boundary is between two separate nations, and where equal access to the navigable portion of the river may *not* be available. As between two states of the United States, this cannot be the case.

Thus in *Georgia* v. *South Carolina*, 257 U.S. 516 at 522 (1921), this Court held that the state boundary in the Savannah, Tugaloo and Chattooger Rivers lay along the geographic middle rather than the thalweg. The key to the decision was Article 2 of the Beaufort Convention of 1787 between the two states, which provided for equal and unrestricted right to the citizens of each state to navigate the boundary rivers. Said the Court: "Thus article 2 takes out of the case any influence which the thalweg or main navigable channel doctrine * * * might otherwise have had* * * *"

Similarly in *Wisconsin* v. *Michigan*, 295 U.S. 455 (1935),

freedom of navigation existing, the Court selected the geographic middle of Green Bay from the mouth of the Menominee River, out into the lake, as the state boundary. An equitable division of territory was held important because conflict over fishing rights had precipitated the litigation. 295 U.S. at 462.

A prominent modern commentation supports this view.

> "The function of a river — the manner in which a river is used — should be the determining factor in deciding which type of boundary will be applied *in concerto*." Bouchez, The Fixing of Boundaries in International Boundary Rivers, 12 Intl. & Comp. LQ. 789 (1963) at 797. "[I]f, for example, fishing is also important, then it is perhaps more equitable to apply the median line, provided that it is stipulated expicitly that there is free navigation in the whole river for ships belonging to both nations." Id. at 798.
>
> "Such a system of delimitation has been practiced in, for instance, the Passammaquoddy [sic] Bay. In pursuance of such regulations freedom of navigation is guaranteed while each nation controls a fishing area of equal size. In all other cases — in all situations in which navigation is not a relevant factor — the median line, in general is to be preferred. Even when the interests are dissimilar the median line is the best solution. The main argument supporting the latter statement is that both States under such a solution are entitled to claim equal amounts of the water of the river." Id.

II. THE RULING AND FINDING OF THE SPECIAL MASTER FIXING THE LOCATION OF "THE MOUTH OF PISCATAQUA HARBOR" WAS CORRECT.

The motion for entry of judgment by consent of the parties does not state where the "mouth of Piscataqua Harbor" is located. Indeed, since the motion mistakenly proceeds under the thalweg rule, the location of the mouth of the harbor is largely immaterial. Under the thalweg rule, the boundary follows the center of the channel of navigation as far out to sea as it can be traced, even though this point is beyond the mouth of "the harbor". Thus in *New Jersey* v. *Delaware*, *supra*, the

boundary was held to follow the channel of navigation far beyond the confines of any possible "harbor", i.e., for the full length of Delaware Bay (almost 50 miles), where the opposite shores are at many points 10 to 25 miles apart.

The proposed consent decree (par. 5) states where the end of the channel of navigation of the Piscataqua River is located. As claimed by the defendant Maine in its brief (p. 10), the end of the channel of navigation (as defined in the proposed decree) is where it is intersected by a line drawn from the tip of Odiornes Point northeasterly to whistling buoy No. 2KR at Kitts Rocks. Kitt Rocks are a reef which is under water at all times, even at low water. Thus Kitts Rocks is not even a "low tide elevation" (See New Hampshire's exceptions and supporting brief at part I). Whatever the appropriateness of using the Kitts Rocks' buoy as a point of reference to mark the termination of the channel of navigation, it is entirely inappropriate to mark the "mouth of the harbor" as those words were used in the decree of 1740. It is difficult to dispute the logic of the Special Master's report (at page 36) where he says:

> "Since the question is the meaning of the 1740 decree, it cannot be said that uncharted 'rocky reefs' or later navigational aids could have played any part in the deliberations of the King and Commissioners but rather a location on more solid land was intended."

Kitts Rocks do not appear on the Mitchell Plan drawn for the Boundary Commissioners in 1737 (App. C to Special Master's Report).

The Special Master has found and ruled that "the mouth of the harbor" is a straight line connecting the tip of Odiornes Point with the tip of Gerrish Island just southwest of Seward's Cove (Report at p. 34). These points are actually the "headlands" on opposite shores at the mouth of the harbor. It would be a logical and reasonable interpretation to draw the closing line of the harbor here, because this location is where the regime of internal waters ends and the regime of the territorial sea begins. Therefore, this line should be the location. The background evidence indicates that the decree of 1740 looked to this location of the mouth of the harbor. The exhaustive review of ancient maps and documents and of statements by

reliable historians, made by the Special Master (Report at pp. 32-36), fully supports this location of the harbor's mouth.

At the 1930 Hague Conference for the Codification of International Law, the subcommittee dealing with the subject reported as follows;

> "When a river flows directly into the sea, the waters of the river constitute inland waters up to a line following the general direction of the coast across the mouth of the river, whatever its width" Shalowitz, Shore and Sea Boundaries (Dept. of Commerce, 1962) vol. I at p. 62.

The same author states: "Both with respect to true bays and rivers, the line marking the seaward limit of inland waters is a headland-to-headland line" Shalowitz, *op. cit.*, vol. I at 63. The definition of "headlands" set forth by Shalowitz (*op. cit.* vol. I at pp. 63-65) is entirely consistent with the finding and ruling of the Special Master as to the location of the harbor's mouth in the instant case. It should be noted that there are no permanent harbor works outward of this line.

In the final report of the Special Master in *United States* v. *California*, 332 U.S. 19, filed November 10, 1952, at pp. 46 and 47 of his report, the Special Master followed the language of the subcommittee of the Hague Conference quoted above, *verbatim*, in the section of his report entitled "River Mouths".

Article 13 of Section II of the 1958 Geneva Convention states:

> "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low tide line of its banks."

Shalowitz *op. cit.* at p. 62 note 74 regards Article 13 as the equivalent of the earlier language of the Hague Conference subcommittee quoted above. If the line runs to the "banks", this would preclude the use of Kitts Rocks as a terminus of the closing line. In the supplemental decree of this Court in *United States* v. *California*, 382 U.S. 418 (1966) in pars. 4(a) and 5, the same general view of the law is taken:

"In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean low water meets the outermost extension of the headlands."

See also *United States* v. *Louisiana*, 394 U.S. 11 (1969) at pp. 58-66 and report of the Special Master thereon at pp. 30-32. The location of the "headlands" used to draw the closing of the harbor must be such as to "enclose landlocked waters". Kitts Rocks would not do this, since it is submerged at all times and a large gap of territory exists between No. 2KR whistling buoy and the Maine coast.

See also the report of the Special Master (at pp. 27 and 53 of the report) in *United States* vs. *Florida*, U.S. , (no. 52, orig; 43L. Ed(2) 375), as to the location of the mouths of the St. Mary's and St. Johns Rivers. This report was confirmed by this Court as to these particular rivers.

III. THE SPECIAL MASTER WAS CORRECT IN RECOMMENDING THE REJECTION OF THE MOTION FOR ENTRY OF JUDGMENT BY CONSENT.

A. *The effect of the decision in Vermont v. New York.*

Vermont v. New York, 417 U.S. 270 was decided by this Court June 3, 1974. It rejected a proposed consent decree in settlement of litigation between two states, falling within the original jurisdiction.

The grounds of the decision appear to be twofold: (1) That the settlement called for continuing supervision by the Court, a function more arbitral than judicial; and (2) that the settlement did not involve the exercise of the judicial power, i.e., the application of correct principles of law to the facts of the case. In regard to the second point, the Court said:

"Our original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a 'common law'

formulated over the decades by this Court. The proposals submitted by the South Lake Master to this Court might be proposals having no relation to law. Like the present decree they might be mere settlements by the parties acting under compulsions and motives that have no relation to performance of our Article III functions. Article III speaks of the 'Judicial power' of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations. Nothing in the proposed decree nor in the mandate to be given the South Lake Master speaks in terms of 'judicial power'."

The text and significance of this decision were not known by counsel in the present action at the time the proposed settlement herein was finally agreed to. The subsequent filing of a stipulation regarding the record "for decision of this action" was intended to provide the Special Master with a basis for exercising judicial power. This stipulation regarding the record is fully reported by the Special Master at pages 2-3 of his report.

The Court in *Vermont* v. *New York*, *supra*, suggested that the parties might more appropriately compose their differences either by an interstate compact or by an out-of-court settlement agreement providing for dismissal of the complaint. Neither vehicle is available here. An interstate compact was attempted here and failed (Report, p. 6). An agreement of lesser stature than an interstate compact, would require legislative action, at least in New Hampshire, in view of the provisions of RSA 1:15 of New Hampshire, establishing a boundary in the disputed area obviously unacceptable to Maine. RSA 1:15 is binding on all public officers of New Hampshire, unless and until changed by statute, interstate compact or judgment of this Court (see Appendix VIII hereto). Furthermore, the legislative branch of the New Hampshire government by concurrent resolution adopted as recently as March 7, 1975, expressed disapproval of the consent decree proposed herein (see Appendix IX hereto). This concurrent resolution was noted and discussed by the Special Master at page 3, note 2 of his report.

The foregoing background makes clear the improbability of resolution of this boundary dispute except by exercise of the judicial power of this Court. However, *Vermont* v. *New York*,

supra, makes it clear that this Court will not approve a consent decree, in litigation between two states, unless the process of approval or disapproval involves the exercise of judicial power.

B. *Proposed consent decrees in interstate boundary litigation should not be perfunctorily approved, in any event.*

In such boundary cases, this Court has said on occasion that it proceeds only with the utmost circumspection and deliberation. *Iowa* v. *Illinois*, 151 U.S. 238.

A proposed consent decree, as here, involves an agreement between officers of the executive branches of the governments of the two states, which is presented to this Court for approval. It does not take effect *until approved;* hence it is entitled "motion for entry of judgment by consent of plaintiff and defendant". Unless approved by this Court in the exercise of the judicial power, such an agreement (settling a common state boundary) could not take effect and become binding, unless approved by the Congress. "No state shall, without the consent of Congress * * * enter into an agreement or compact with another state * * * *" U.S. Const., Art. I, s. 10, cl. 3.

As said in *Florida* v. *Georgia*, 58 U.S. (17 Howard) 478:

> "And if Florida and Georgia had by negotiation and agreement proceeded to adjust this boundary, any compact between them would have been null and void without the assent of Congress."

The Court in that case alludes to the danger that the Compact Clause of the Constitution will be circumvented if the states are permitted to present a proposed adjustment of their dispute which may be approved by the Court without careful examination, including hearing the Attorney General of the United States. Since an interstate boundary agreement cannot ordinarily take effect until it is approved by the Congress, it might be considered a "circumvention" of the Compact Clause for the states to incorporate the same agreement in a proposed consent decree for approval of this Court, unless, of course, this Court deliberately exercises the "judicial power" in reviewing and approving or disapproving the proposed settlement.

C. *The exercise of judicial power requires that the Court independently examine the proposed consent decree and grant or withhold approval in accordance with the applicable law, and the evidence in the record.*

In previous cases within its original jurisdiction, the Court has occasionally adopted a consent decree or stipulation of the parties, but in these cases, the Court has usually declared the applicable law, after a hearing, and then given the parties leave to submit a decree or stipulation consistent with the opinion of the Court. *Virginia* v. *Tennessee*, 148 U.S. 503, 158 U.S. 267 at 271; 177 U.S. 501; *Nebraska* v. *Iowa*, 143 U.S. 359 at 370; 145 U.S. 519; *Missouri* v. *Nebraska*, 196 U.S. 23; 197 U.S. 577; *Iowa* v. *Illinois*, 147 U.S. 1; 151 U.S. 238; 202 U.S. 59; *Georgia* v. *South Carolina*, 257 U.S. 516 at 523; and *Arizona* v. *California*, 373 U.S. 546, 595 and 602.

In *Kentucky* v. *Indiana*, 281 U.S. 163, judgment was rendered on the pleadings because of admissions made in the defendant's answer. In *Utah* v. *United States*, 394 U.S. 89 at 94-95, a stipulation was approved during the trial, which narrowed the issues.

In *Wisconsin* v. *Illinois*, 388 U.S. 426, the Court adopted the findings of fact of the Special Master made after a trial, but then adopted a proposed consent decree of the parties based on these findings, without reviewing the legal conclusions of the Special Master. However, the Court was in a position to review and determine the legal propriety of the proposed decree in the light of the Master's findings of fact.

In *Arizona* v. *California*, 373 U.S. 546, a subsidiary branch of the case involved the conflicting claims of water rights by Arizona and New Mexico in a tributary, the Gila River. The Special Master ruled that this issue should be governed by the legal principles of "equitable apportionment", and then conducted an evidentiary hearing on this issue. Thereafter, the two states made a compromise settlement of this issue which the Master reviewed, accepted and incorporated in his findings, conclusions and recommended decree. No exceptions were taken by any party, and the Court accepted the Master's recommendations. Again, this was an exercise of "the judicial power". The applicable law was declared, evidence was received, and then the parties stipulated; the Master was in a

position to review the legal propriety of the parties' stipulation and obviously found it consistent with the law and the evidence, when he adopted it as his own.

In the case at bar, the proposed consent decree moved by the parties, goes further than any of those approved by the Court in the cases cited above. Here the parties by their motion have not only stipulated as to certain facts but also as to the applicable law. And the stipulations as to facts in the motion were *limited* and confined to a few basic conclusions of fact without any background evidence. Thus the judgment of the Court would probably not have been invoked, but for the subsequent filing of a stipulation of the parties providing a more detailed evidentiary record "for the decision of this action" (Report, pp. 2, 3).

In *Pope* v. *United States*, 323 U.S. 1 at 12, it was held that judgment by consent may be a judicial act so long as it involves the application of legal principles to facts ascertained "by proof or by stipulation".

What standards should the Court apply in reviewing a motion for entry of judgment by consent of the parties in a case between two states under its original jurisdiction? The motion does require the approval of the Court in order to become a judgment; and in order to have jurisdiction to give or refuse approval, the Court should be in a position to act judicially with reference thereto. What is appropriate in private litigation may be wholly inappropriate in cases involving important public rights.

We suggest that the proper standards are these in cases such as this one: The proposed consent decree should only be approved (1) if the Court determines that it is based upon correct principles of law, independently determined by the Court to be applicable, and (2) if the Court determines that the stipulated facts are sufficiently detailed and complete to make possible the exercise of independent judgment as to what the applicable law is. In this connection, the Court or its Special Master may always require an evidentiary hearing or a further stipulation of facts in areas of the case where it finds the proposed consent decree to contain insufficient factual material.

D. *The proposed consent decree is based upon incorrect principles of law and an insufficient stipulation of facts and should have been rejected.*

In the light of *Vermont* v. *New York*, supra, it is evident that a proposed consent decree will not be adopted unless presented in a context which invokes "the judicial power". The Special Master apparently believed that he was being presented with a *fait accompli*, which did not require the exercise of any judgment on his part, so he recommended disapproval, and proceeded to decide the case on the record before him.

Actually, his ultimate rulings show that the proposed consent decree could not have been approved, *in any event*. It is based upon incorrect principles of law (1) in that it applies the "thalweg" rule instead of the "geographic middle" rule as set forth in detail in part I of this brief, and, (2), in that it fails to apply the "headland rule" in determining the location of the mouth of the harbor as set forth in detail in part II of this brief. A consent decree based upon principles of law, determined by the Court to be incorrect, cannot be approved, for this would not be an exercise of the judicial power. *Vermont* v. *New York, supra; Pope* v. *United States, supra.*

Further, the stipulations as to facts in the proposed consent decree are inadequate to enable a court to exercise judgment on the issues. Pars. 3, 5, 6, 7 and 8 are the only paragraphs in the proposed decree which contain factual evidence, as distinguished from conclusions of law (See text in appendix to Maine's principal brief, pp. 24-27). None of the historical background which eventually persuaded the Special Master to use "geographic middle" as the boundary, appears in these paragraphs. It was only when the parties later supplied the Special Master by stipulation with a record of supplemental facts (Report pp. 2, 3) that there was sufficient factual evidence before the Court to permit the exercise of an independent judgment in this case.

IV. THE PRESENT POSITION OF NEW HAMPSHIRE WITH RESPECT TO THE PROPOSED CONSENT DECREE.

New Hampshire has always assumed that the motion for entry of judgment by consent would be granted *only if* the Court

was satisfied that it was based upon correct principles of law in the light of the factual background, and that it would be rejected if the Court determined otherwise. Based upon this assumption, New Hampshire did not file a motion for leave to withdraw from the motion for entry of the consent decree, at the time the Special Master filed his report recommending its rejection.

However, if the Court now determines that the Special Master was correct in his ruling of law applying the principle of "geographic middle" to the river boundary and in locating "the mouth of the harbor", but that the Court is constrained to accept the consent decree notwithstanding, then we now represent to the Court that, in such event, New Hampshire desires to be relieved of participation in and consent to the motion for entry of judgment by consent, and is prepared to file a motion for leave to withdraw therefrom.

Judgment by consent requires the existence of consent at the very moment the court undertakes to make the agreement the judgment of the court. See 47 Am.Jur.(2) 141 *Judgments*, s. 1083, "Necessity of consent — effect of withdrawal"; *Lee* v. *Rhodes*, 227 N.C. 240; 41S.E(2) 747; *Van Donselaar* v. *Van Donselaar*, 249 Iowa 504, 87 N.W.(2) 311; *Burnaman* v. *Heater;* 150 Tex. 333; 240 S.W.(2) 288; *Re Cartnell's Estate*, 120 Vt. 234; 138 Atl.(2) 592; *In Re Thompson's Adoption*, 178 Kans. 127; 283 Pac(2) 493.

V. CONCLUSION

We respectfully submit that the exceptions of the defendant State of Maine should be overruled. The Special Master correctly located the "mouth of Piscataqua Harbor" and correctly applied the rule of "geographic middle" instead of "thalweg" to determine the river boundary. The motion for entry of judgment by consent of the parties was properly rejected because it is contrary to applicable principles of law and based upon stipulations of facts insufficient in detail to enable the Court to determine the applicable law.

Respectfully submitted
The State of New Hampshire
By David H. Souter
Attorney General
/s/Richard F. Upton
Special Counsel,
Counsel for Plaintiff

Of Counsel:
William S. Barnes

I. Excerpt from New Hampshire's demand as to boundary, filed with the Boundary Commisioners August 2, 1737, *N.H. State Papers*, vol. XIX, 283, (A. S. Batchellor ed., Manchester, 1891):

* * * *

"In behalf of His Majesty & of his Governm' of the Province of New Hampshire We do demand & Insist that the Southern boundary of Said Province should begin at the end of three Miles North from the Middle of the Channel of Merrimack River where it runs into the Atlantic Ocean, and from thence would run on a Straight Line West up into the Main Land (towards the South Sea) until it meets with His Majesty's other Governments —

"And that the Northern Boundary of New Hampshire should begin at the Entrance of Piscataqua Harbour & so to pass up the Same into the River of Newichwannock & through the Same into the furthest head thereof and from thence North Westward (that is North less than a quarter of a point Westerly,) as far as the British Dominion Extends, and also the Western half of the Isles of Shoals, we say lyes within the Province of New Hampshire —"

* * * *

II. Excerpt from Massachusetts' demand dated August 5, 1737 filed with the Boundary Commissioners, *N.H. State Papers*, vol. XIX, 290 at 291:

* * * *

"NOW therefore Pursuant to these Antient Grants from the Crown made above a hundred years agoe acknowl-

edged and more particularly explained in that Judicial Determination of the King in Council and recited and Confirmed in the Province Charter. The Province of the Massachusetts Bay Claim and demand Still to hold and possess by a boundary Line on the Southerly Side of New Hampshire beginning at the Sea three English miles North from the black Rocks So called, at the Mouth of the River Merrimack as it Emptied it Self into the Sea Sixty years agoe, thence running Parralel with the River as farr Northward as the Crotch or parting of the River, thence due North as far as a certain Tree Commonly known for more than Seventy Years past, by the Name of Indicots Tree, Standing three English miles Northward of said Crotch or parting of Merrimack River, And from thence due West to the South Sea, which they are able to prove by Antient and Incontestable Evidences are the bounds intended Granted and Adjudged to them as aforesaid; which Grant and Settlement of King Charles the 2d Anno 1677 as abovesaid, we Insist upon as Conclusive and Irrefragable.

"AND on the Northerly side of New Hampshire a boundary Line beginning at the Entrance of Piscataqua Harbour passing up the Same to the River Newichwannock through that to the furthest head thereof, and from thence a due Northwest Line, till one hundred and twenty miles from the Mouth of Piscataqua Harbour be finished, which is the extent of the Province of the Massachusetts Bay on that part, And therefore We doubt not but that you will Judge it just and reasonable to Order the bounds and lines beforementioned to be run, mark'd out and Established accordingly, so far as New Hampshire extends; and desire that plans thereof may be made for the perpetual Remembrance of them —"

III. Excerpt from Massachusetts' answer to New Hampshire's demand dated August 1737 filed with the Boundary Commissioners, *N.H. State Papers*, vol. XIX, 293 at 309-310:

* * * *

"and therefore there is not the least Shadow of reason to maintain that the South bounds of the Province of New Hampshire should begin at the end of three Miles North from the middle of the now Channell of Merrimack River, where it now runs into the Ocean according to their Modern claim, but the said Southerly boundary line must and ought and always was held and acknowledged to begin at the End of three Miles North from the black Rocks aforesaid at the Mouth of the said River, as it emptied it Self into the Sea Sixty Years ago,"

* * * *

IV. Decision of the Boundary Commissioners given at Hampton, New Hampshire, September 2, 1737, *N.H. State Papers*, vol. XIX, 391, 392:

"Prov. of) Hampton Sept^{r} the 2, 1737, at a Court of N. Hamp^{r}) Commiss^{rs} Appointed by His Majesty's Commission under the Great Seal of Great Britain to Settle Adjust & Determine the Respective Boundaries of the Provinces of the Mass^{a} Bay & New Hamp^{r} in New England then & there held.

"In Pursuance of His Majesty's afores^{d} Commission the Court took under Consideration the Evidences, Pleas & Allegations offerd & made by Each party referring to the Controversy depending between them and upon mature Advisement on the whole, a doubt arose in point of Law & the Court thereupon came to the following resolution viz That if the Charter of King William & Queen Mary Dated Octob^{r} 7th in the third Year of their Reign Grants to the Province of the Mass^{a} Bay all the Lands which were Granted by the Charter of King Charles the first Dated March 4th in the fourth Year of his Reign to the late Colony of the Mass^{a} Bay, lying to the Northward of Merrimack River then the Court Adjudge & Determine, that a Line Shall run Parallel with the Said River at the Distance of three English Miles North from the Mouth of

the Said River beginning at the Southerly Side of the black Rocks So called at Low water mark & from thence to run to the Crotch or parting of the Said River where the Rivers of Pemigewasset & winnepiseoke meet and from thence due North three English Miles & from thence due West towards the South Sea until it meets with His Majestys other Governments—which shall be the boundary or Dividing Line between the Said Prov^{s} of the Mass^{a} Bay & New Hamp^{r} on that Side—But if otherwise then the Court Adjudge & determine that a line on the Southerly Side of New Hamp^{r} beginning at the Distance of three English miles North from the Southerly Side of the black Rocks afores^{d} at Low Water Mark & from thence running due West up into the Main Land towards the South Sea until it meets with His Majestys other Governm^{ts} Shall be the boundary Line between the Said Provinces on the Side afores^{d}—which point in doubt with the Court as afores^{d} they Humbly Submit to the wise Consideration of His Most Sacred Majesty in his Privy Council to be determined according to His Royal Will & Pleasure therein—

"And as to the Northern Boundary between the Said Provinces the Court Resolve & Determine that the Dividing Line Shall pass up thro' the mouth of Piscataqua Harbour & up the Middle of the River into y^{e} River of Newichwannock (part of which is now called Salmon Falls) & thro' the Middle of the Same to the furthest head thereof & from thence North two Degrees Westerly until one hundred & twenty Miles be finished from y^{e} Mouth of Piscataqua Harbour Afores^{d} or until it meets with His Majestys other Governm^{ts} and that the Dividing line shall part the Isles of Shoals & run thro' the Middle of the Harbour between the Islands to the sea on the Southerly Side & that the Southwesterly part of the Said Islands Shall lye in & be Accounted part of the Prov. of New Hamp^{r} & that y^{e} North Easterly part thereof shall lie in & be Accounted part of the Prov. of the Mass^{a} Bay & be held & Enjoyed by the Said Prov^{s} Respectively in the Same manner as they Now do & have heretofore held and Enjoyd the Same—And the Court do further Adjudge that y^{e}

Cost & Charge arising by taking out the Commission as also of the Commissrs & their officers Viz the two Clerks Surveyer & Waiter for their Travelg Exps & attendance in the Execution of the Same be Equally born by the Said Provs

Ph Livingston
Will:Skene
Eras: Jas Philipps
Otho Hamilton
John Gardner
John Potter
George Cornell"

* * * *

V. Excerpts from New Hampshire's appeal to the Privy Council, July 20, 1738, *N.H. State Papers*, vol. XIX, pp. 565 at 591-592 and 596-597:

* * * *

"As to the southern Boundary of New Hampshire, the first Question in the natural Order is, where that boundary Line shall begin? New Hampshire insisted that three Miles should be taken North from the middle of the Channel of the River, where it runs into the Atlantick Ocean; and the Massachusets, by their Demand before the Commissioners, insisted it should begin, at the Sea. but three Miles North from the Black Rocks, where (as they groundlessly pretended, but never proved) the River had emptied itself 60 Years ago. — The late Attorney and Sollicitor General, after considering the Massachusets new Charter, and being attended by Cousel on both sides seven or eight several times, had reported that, according to the Intention of that new charter (which recited their old Charter also) the Line ought to begin three Miles North of the Mouth of the River, where it empties itself into the

Sea; but the Commissioners have directed it to begin three Miles North from the Mouth of the River, beginning at the sourtherly Side of the Black Rocks, at Low-Water Mark, which is indeed four Miles North of every part whatsoever of the Mouth of the River as appears by Inspection of the Commissioners Plan; for the Black Rocks lay deep in a Bay, considerably within the River's Mouth, and a Mile or more, North of every part whatsoever of the Mouth of the River, wherefore, considering this single Point either under the Massachusets old Charter, or under their new one, under neither of their Charters were they to go more than three Miles to the northward of that River, whereas measuring three Miles from the Black Rocks, in the Elbow or Bay, up within the side of the River, it really gives to the Massachusets four Miles North of the Mouth of the River;"

* * * *

"As to the northern Boundary, the Commissioners Judgment directs the dividing Line to pass up the middle of Piscataqua River and through the middle of Newichwannock River; but it's hoped that that is wrong: For, if recourse be had to the Grant from the Crown of the Province of Maine, made to Sir Ferdinando Gorges, it will appear that no part of the Rivers were granted to him, but only Maine Land, between the Rivers of Piscataqua and Sagadahocke; consequently if he did make any Conveyance to the Massachusets, (which has been pretended, though not proved) he could not convey to the old Colony of the Massachusets any part of either of those Rivers which he himself had no Title to. — And, upon looking into the new Charter to the Province of the Massachusets, where the Lands which made the Province of Maine are granted to them, it will appear that the same Land is again granted, in the same Terms, as a Portion of main Land between the said Rivers. — The Massachusets never possess'd, or claimed, the River itself, or any part of it, neither under their old or new Charter; nor, in their De-

mand filed before the Commissioners, did they demand half or any part of the River: So that it's humbly hoped this part of the Commissioners Judgment, which in consequence adjudges half of the River to the Massachusets without any Demand by, or any Title in, the Massachusets will be revers'd."

VI. Excerpt from Massachusetts' appeal to the Privy Council, submitted March 5, 1739, *N.H. State Papers*, vol. XIX, 601 at 622-623 and 627-628:

"And that those material Words of 'any and 'every Part thereof,' inserted in the former Charter, are omitted in the present; and therefore this Northern Line must, agreeable to the present Charter, begin three Miles North from the Middle of the Channel of Merrimack River, where it runs into the Atlantick Ocean, and from thence should run on a strait Line West up into the main Land towards the South Sea; or that otherwise it will not hold the same Breadth, but will vary with every Turn of the River; and that when the River ceases to run a direct West Course, it cannot be a Northern Boundary.

"This Objection proceeds on a Supposition, that this Case is to rest on the present Charter, without any Regard had to the former, and the judicial Determination made upon it: For admit them into the Consideration, (as the Massachusetts humbly insist they must) the Whole of this Objection is immediately overturned."

* * * *

"New Hampshire insist, That the Commissioners have done wrong in directing the Northern Line to run thro' the Mouth of Piscataqua, and so up the Middle of the River; insisting Gorges's Patent doth not pass any Right to the River, and that the Whole of that River, and the Jurisdiction thereof, hath ever been in the Possession of New Hampshire, and never claimed by the Massachusetts.

"By the express Words of Gorges's Grant, the Line must run thro' the Mouth of Piscataqua, and up the Middle of the River, it being impossible to run the Line agreeable to the Description of that Grant, without.

"And (notwithstanding what New Hampshire have surprisingly insisted on to the contrary) Possession and Enjoyment have been agreeable hereto, it being a known Truth, that from Time immemorial the Province of Maine have and now do possess and receive Taxes constantly from all the Islands lying in that River, on that Side towards the Province of Maine; and the Massachusetts aver in the most solemn manner, That New Hampshire have never in any one Instance exercised the Jurisdiction of the whole River, and that the Province of Maine have constantly possessed and enjoyed the Islands all along their Side of the River — the Fact being, That all the Islands in the said River have been always considered and taxed as belonging to that Government they lay nearest to."

* * * *

VII. The Recommendations of the Appeal Committee of the Privy Council to the King. *N.H. State Papers*, vol. XIX, 600:

"THE CASE
OF HIS MAJESTY'S PROVINCE OF
NEW HAMPSHIRE.
upon two APPEALS

"Relating to the Boundaries between that Province and the Province of the Massachusets Bay.

"To be heard before the Right Honourable the Lords of the Committee of his Majesty's Most Honourable Privy-Council for hearing APPEALS from the Plantations, at the Council-Chamber at Whitehall.

"Wednesday 5th March 1739. at 6, in the Evening & again on 10th March —

"Ordd and adjudged —

"That the Northern Boundarys of the Province of the Massachusets Bay are and be a Similar Curve Line pursuing the Course of Merrimack River at three Miles Distance on the North side thereof beginning at the Atlantick Ocean and ending at a Point due North of a Place in the Plan returned by the Commissrs called Pantucket Falls and a Strait Line drawn from thence due West cross the said River till it meets with His Majestys other Governmts And it is further Ordered that the rest of the Commissrs Report or Determination be Affirmed—"

* * * *

Note: The above recommendation was approved by Order in Council dated April 9, 1740, reported in 2 Laws of N.H., App. 793-794; see Report at p. 30.

VIII: NEW HAMPSHIRE REVISED STATUTES ANNOTATED: 1:14-15

Seaward Limits of Jurisdiction [New]

1:14 Extent. Subject to such lateral marine boundaries as have been, are herein or shall hereafter be legally established between this state and the state of Maine and the commonwealth of Massachusetts, the territorial limits and jurisdiction of this state shall extend to and over, and be excercisable with respect to, waters offshore the coast of this state as follows:

I. Marginal Sea. The marginal sea to its outermost limits as said limits may from time to time be defined or recognized by the United States of America by international treaty or otherwise. The coastal baseline of this state from which the breadth of the marginal sea is measured shall be drawn in conformity with the treaties to which the United States is a party. Subject to future change as hereinabove

setforth, the marginal sea is three nautical miles in breadth.

II. The High Sea. Beyond the marginal sea, to the outer limits of the territorial sea of the United States of America and to whatever limits may be recognized by the usages and customs of international law or any treaty or otherwise according to law. This state claims title for a distance of two hundred nautical miles from the coastal baseline of the state, or to the base of the continental shelf, whichever distance is the greater.

III. Submerged Land. All submerged land, including the subsurface thereof, lying under the aforementioned waters.

Source. 1973, 580:1, eff. July 5, 1973.

1:15 Lateral Boundaries. Until otherwise established by law, interstate compact or judgment of the supreme court of the United States, the lateral marine boundaries of this state shall be and are hereby fixed as follows:

I. Adjoining the State of Maine: Beginning at the midpoint of the mouth of the Piscataqua River; thence southeasterly in a straight line to the midpoint of the mouth of Gosport Harbor of the Isles of Shoals; thence following the center of said harbor easterly and southeasterly and crossing the middle of the breakwater between Cedar Island and Star Island on a course perpendicular thereto, and extending on the lastmentioned course to the line of mean low water; thence 102° East (true) to the outward limits of state jurisdiction as defined in RSA 1:14. As to that section of the lateral marine boundary lying between the mouth of the Piscataqua River and the mouth of Gosport Harbor in the Isles of Shoals the so-called line of "lights on range", namely, a straight line projection south-easterly to the Isles of Shoals of a straight line connecting Fort Point Light and Whaleback Light shall be prima facie the lateral marine boundary for the guidance of fishermen in the waters lying between Whaleback Light and the Isles of Shoals.

II. Adjoining the Commonwealth of Massachusetts: As defined in chapter 115, 1901; and thence one hundred and seven degrees East (true) to the outward

limits of state jurisdiction, as defined in RSA 1:14.

III. The fixation of lateral marine boundaries herein is without prejudice to the rights of this state to other marine territory shown to belong to it. By the fixation of the foregoing lateral marine boundaries, this state intends to assert title to its just and proportional share of the natural resources in the Atlantic Ocean lying offshore its coastline and within the limits defined in RSA 1:14.

8Source. 1973, 580:1, eff. July 5, 1973.

IX:THE STATE OF NEW HAMPSHIRE

HOUSE CONCURRENT RESOLUTION

Resolved by the House of Representatives; the Senate concurring;

That, the General Court, being the duly elected representatives of the sovereign people of the state of New Hampshire, in light of chapters 58, 564 and 580 of the laws of 1973, hereby declares that it regards that section of the lateral marine boundary between the states of New Hampshire and Maine lying between the mouth of the Piscataqua River and the mouth of Gosport Harbor in the Isles of Shoals to be the line of "lights on range", so-called, as defined in RSA 1;15, I; and

That, the general court is of the opinion that no agreement, undertaking or stipulation by any officer, representative, attorney or agent of the state of New Hampshire, which would have the effect of establishing as said section of the lateral marine boundary any line other than said line of "lights on range" shall bind the state of New Hampshire, unless such agreement, undertaking or stipulation is entered into in accord with RSA 1:15; and

That, the general court hereby urges the attorney general and special counsel actively to claim and defend in any litigation currently pending in The United States Supreme Court said line

of "lights on range" or a line claimed to be the true and legal boundary line by the amicus curiae pursuant to the order of the special master in said litigation issued on December 16, 1974.

(adopted March 7, 1975)